McClay Energy, Inc. *and* United Mine Workers of America, District 17. Case 09–CA–168156

August 19, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge and an amended charge filed by United Mine Workers of America (the Union) on January 22 and April 15, 2016, respectively, the General Counsel issued a complaint on April 15, 2016, against McClay Energy, Inc. (the Respondent), alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent failed to file an answer.

On May 12, 2016, the General Counsel filed a Motion for Default Judgment with the Board.[1] Thereafter, on May 13, 2016, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was received by April 29, 2016, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the General Counsel's motion disclose that by letter dated May 5, 2016, the Region advised the Respondent that unless an answer was filed by May 10, 2016, a motion for default judgment would be filed. The Respondent again failed to file an answer.[2]

In the absence of good cause being shown for the failure to file an answer, we deem the allegations in the complaint to be admitted as true, and we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times since about June 16, 2015, and continuing to date, the Respondent has been a corporation with an office in Auxier, Kentucky, and has been engaged in the mining of coal at its facility in Hensley, West Virginia.

During the calendar year ending December 31, 2015, the Respondent, in conducting its operations, purchased and received at its Hensley, West Virginia facility goods valued in excess of $50,000 directly from points outside the State of West Virginia.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, Nathan Bentley has held the position of the Respondent's president and has been an agent of the Respondent within the meaning of Section 2(13) of the Act.

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all

[1] On June 24, 2016, the General Counsel submitted a supplement to his motion for default judgment with information related to the service of documents in this case.

[2] The motion for default judgment and the supplement to the motion indicate that the charge and amended charge were served by regular mail to the address of the Respondent's registered agent and incorporator in Kentucky, as that address is listed in the records maintained by the Kentucky Secretary of State. The complaint was served by certified mail to the address of the Respondent's registered agent in Kentucky, and tracking information provided by the U.S. Postal Service shows that document was unclaimed. In addition, the motion for default judgment was served by mailing copies by regular mail to the address of the Respondent's registered agent in Kentucky and also by electronic mail to the Respondent. There is no indication that any of the documents sent to the Respondent by regular mail or electronic mail were returned.

It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See *Cray Construction Group, LLC*, 341 NLRB 944, 944 fn. 5 (2004); *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003). Further, the failure of the postal service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. Id.; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), enfd. sub nom. *NLRB v. Sherman*, 843 F.2d 1392 (6th Cir. 1988).

office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

Since about September 23, 2015, and at all material times, the Respondent has recognized the Union as the exclusive collective-bargaining representative of the unit. This recognition is embodied in a letter dated September 23, 2015.

About October 13, 2015, the Union, by letter, requested that the Respondent bargain collectively with it as the exclusive collective-bargaining representative of the unit.

Since about November 30, 2015, the Respondent has failed and refused to bargain with the Union.

About September 24, 2015, the Respondent ceased operations and laid-off unit employees. The Respondent engaged in such conduct without prior notice to the Union and without affording the Union an opportunity to bargain over the effects of this conduct on unit employees. The effects of the Respondent's cessation of operations and laying off of unit employees relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.[3]

Since about October 13, 2015, the Union has requested, in writing, that the Respondent furnish the Union with the following information: (1) copies of both Federal and State mining permits for McClay Energy's operational control of the Westchester Mine; (2) a copy of the insurance policy or other document confirming that McClay Energy has Workers Compensation coverage for the employees at the Westchester Mine; (3) a copy of the Wage Bond posted with the West Virginia Division of Labor covering the employees of McClay Energy and the Westchester Mine; and (4) a roster of all the employees (along with their contact information, i.e., addresses, phone numbers, job titles and hire or recall dates) who are working or who have ever worked for McClay Energy at Westchester Mine since May 2015.

[3] Although the complaint alleges that the Respondent's cessation of operations and laying off of unit employees are mandatory subjects of bargaining, we need not address those allegations because there is no allegation that the failure to bargain about the *decision* to cease operations violates the Act. Instead, the complaint specifically alleges only that the Respondent violated the Act by failing to give notice and afford the Union an opportunity to bargain about the *effects* of that conduct. The Board has repeatedly found that the effect of such decisions on unit employees is a mandatory bargaining subject. See *Kohler & Sons, Inc.*, 355 NLRB 221, 222 fn. 3 (2010); *Nick & Bob Partners*, 340 NLRB 1196, 1198 fn. 2 (2003). Accordingly, we find that the complaint supports a cause of action as to the failure to bargain over the effects of the Respondent's decision to cease its operations and lay off unit employees.

Since October 13, 2015, the Respondent has failed to furnish the Union with the requested information described above.

Since about November 6, 2015, the Union has requested, by email, that the Respondent furnish: (1) the information it requested on October 13, 2015; (2) a detailed explanation of the Respondent's plans (including a time table) for the resumption of mining operations at the Westchester Mine; (3) a statement of any business justification for the cessation of operations; and (4) identities of all persons who have performed work of any kind at the mine since cessation of operations and list of work performed.

Since November 6, 2015, the Respondent has failed to furnish the Union with the requested information described above.

The information requested by the Union on October 13 and November 6, 2015, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of its decision to cease operations at its facility in Hensley, West Virginia, we shall order the Respondent to bargain with the Union, on request, about the effects of its decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the

policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violations and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to cease operations of its facility on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased operations of its facility in Hensley, West Virginia, to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Additionally, we shall order the Respondent to compensate unit employees for any adverse tax consequences of receiving lump-sum backpay awards and to file a report with the Regional Director for Region 9 allocating backpay to the appropriate calendar years for each employee, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with relevant and necessary information requested on October 13 and November 6, 2015, we shall order the Respondent to provide the Union with the requested information.

Finally, in view of the fact that the Respondent's operations in Hensley, West Virginia, have ceased, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees who were employed at any time since September 24, 2015, in order to inform them of the outcome of this proceeding.[4]

ORDER

The National Labor Relations Board orders that the Respondent, McClay Energy, Inc., Hensley, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Failing and refusing to bargain collectively and in good faith with the United Mine Workers of America, District 17, as the exclusive collective-bargaining representative of employees in the following appropriate unit with respect to the effects of its decision to cease operations at its Hensley, West Virginia facility:

> All full-time and regular part-time production and maintenance employees employed by the Respondent at its Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to provide the Union with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union concerning the effects of its decision to cease operations at its Hensley, West Virginia facility, and reduce to writing and sign any agreement reached as a result of such bargaining.

(b) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision, with interest.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay

[4] Because the Respondent has ceased operations at its Hensley, West Virginia facility, we need not address the complaint's request for a notice-reading remedy.

awards, and file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Furnish to the Union in a timely manner the information requested by the Union on October 13 and November 6, 2015.

(f) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[5] to the Union and to all unit employees who were employed by the Respondent at the time that it ceased operations at its Hensley, West Virginia facility on September 24, 2015. In addition to the physical mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. August 19, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed By Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the United Mine Workers of America, District 17, as the exclusive collective-bargaining representative of our unit employees set forth below, with respect to the effects of our decision to cease operations at our Hensley, West Virginia facility:

> All full-time and regular part-time production and maintenance employees employed by us at our Route 7, Hensley, West Virginia, Westchester Mine facility, but excluding all contract employees, all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to provide the Union with requested information that is relevant and necessary to the Union's performance of its functions as the exclusive collective-bargaining representative of the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain collectively and in good faith with the Union concerning the effects of our decision to cease operations at our Henley, West Virginia facility, and WE WILL reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay our unit employees their normal wages for the period set forth in the remedy section of the Board's decision, with interest.

WE WILL compensate our affected employees for any adverse tax consequences, if any, of receiving lump-sum

backpay awards, and WE WILL file with the Regional Director for Region 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay to the appropriate calendar years for each employee.

WE WILL furnish the Union in a timely manner the information it requested on October 13 and November 6, 2015.

MCCLAY ENERGY, INC.

The Board's decision can be found at http://www.nlrb.gov/case/09-CA-168156 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570, or by calling (202) 273–1940.